

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY
MARRIED PERSONS' PROPERTY ORDINANCE 1986

No. 18, 1986

This Ordinance removes remaining restrictions on the legal capacity of married women and differences between the legal rules applicable to married women and married men in relation to property.

The Ordinance also makes some other changes to former law incidental to that purpose.

The Ordinance terminates the operation of the Married Women's Property Act 1901 (New South Wales) (the 'Act') in the Australian Capital Territory. The Act applied in the Territory pursuant to the Seat of Government Acceptance Act 1909 (Comm.). It removed nearly all the legal disabilities of a married woman under earlier law. The Ordinance removes the remaining disabilities of married women. It also complements certain rules of Common Law and Equity which distinguish between the responsibilities of married men and those of married women in relation to property, so that both parties to a marriage have equal responsibilities and enjoy equal benefits.

Some provisions of the Ordinance are based on English, New Zealand and Victorian legislation.

Details of the Ordinance are as attached.

Authorized by the
Attorney-General

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ATTACHMENT

Details of the Ordinance

Section 1 provides that the Ordinance may be cited as the Married Persons' Property Ordinance 1986.

Section 2 provides that except where a specific court is mentioned in the Ordinance, the word "court" means either the Supreme Court or the Magistrates Court.

Section 3 provides the general principle that a married woman has the same rights, privileges, powers, capacities, duties and liabilities as a married man, both in her personal capacity and otherwise. This provision applies whenever or wherever the marriage took place. This general principle is subject to any exception provided by another law of the Territory.

Section 4 confers upon a husband the same authority to pledge his wife's credit as a wife has to pledge her husband's credit. At common law, the right of a wife to pledge her husband's credit is derived from cohabitation, not from marriage. This section therefore extends to persons living together as husband and wife, although not married.

Section 5 revokes the common law doctrine of agency of necessity, whereby a wife left without means is entitled to pledge her husband's credit for necessities. In view of the right of a spouse to obtain maintenance, or, in appropriate cases, social security benefits, this rule has become obsolete.

Section 6 invalidates any restraint upon anticipation or alienation attached to property vested in a woman. Restraint upon anticipation or alienation, which restricted a married woman's capacity to deal with her property subject to the restraint, was an equitable device created to protect the

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property of a married woman against claims of her husband and his creditors. It served a useful purpose when a married woman's capacities and rights in relation to property were limited. This is no longer the case.

Section 7 provides that a married person is not liable for any debt incurred by his or her spouse before their marriage. Under the Act, a husband could be liable to some extent for his wife's debts contracted before marriage.

This section does not affect a liability directly incurred by a married person before marriage such as, for example, a liability incurred by a wife before marriage as guarantor of a debt of the other spouse.

Section 8 provides that a married woman shall be liable to criminal proceedings in relation to acts done in respect of her husband's property in the same circumstances in which a married man would be liable to such proceedings in relation to acts done in respect of property of his wife. This provision is similar to section 20 of the Act.

Section 9 applies the same presumption to certain transactions of a married woman as now applies to corresponding transactions of a married man. Where on a purchase the legal title to property is vested in the wife or a child of the person who provided the purchase money, there is a presumption that there was a gift or advancement to the wife or child. Similarly, where a man transfers property to his wife or child, there is also a presumption of a gift or advancement. On the other hand, before the Ordinance, where a woman provided the purchase money or transferred property to her husband or child, it was presumed to be held by the transferee in trust for her.

This section provides that the same presumption of a gift or advancement applies where the transferor or purchaser is a woman as applies where the transferor or purchaser is a man.

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This section also deals with the situation where both spouses contribute to the purchase of property which is vested in one spouse only. In such a case it is presumed that that spouse holds the property on trust for both spouses as joint tenants.

These rules are presumptions only and do not apply where there is a contrary intention on the part of the transferor or purchaser.

Section 10 provides for situations where property is bought or transferred in contemplation of marriage. Where a person ('the transferor') transfers property in contemplation of marriage to his or her intended spouse, or pays for property which is vested in the intended spouse, the transferee is presumed to hold the property in trust for the transferor until the marriage takes place, and then to become the absolute owner of the property. This rule does not apply where there is a contrary intention on the part of the transferor.

Where property paid for or owned by one person is vested in or transferred in contemplation of marriage to himself or herself and his or her intended spouse they shall be taken, unless there is a contrary intention, to hold the property in trust for the person who paid for or owned the property until the marriage takes place, and after the marriage to hold the property as joint tenants.

Where both intending spouses contribute to the purchase of property which is vested in or transferred to only one of them, until the marriage takes place the transferee shall be taken, unless there is contrary intention, to hold the property in trust for both parties as tenants in common in shares proportionate to their respective contributions, and after their marriage for both parties as joint tenants.

Section 11 abolishes the rule that any savings by a married woman from money given to her by her husband for housekeeping

or similar purposes belong to the husband unless the husband intended the savings to be a gift to her. Under this section, property bought with a payment for household expenses and any surplus belong to both spouses as joint tenants unless both spouses have otherwise agreed.

Section 12 provides that where a husband and wife are both named as beneficiaries of property under a will, deed or other instrument, they are, unless the contrary intention is shown, to be treated as 2 persons for the purpose of calculating their entitlement to the property. There was a similar provision in the repealed Act. Its purpose is to overcome the old doctrine that husband and wife were, at law, one person.

Section 13 provides that a husband or wife, or a third party on whom conflicting claims are made by a husband and wife, may apply to the Supreme Court or the Magistrates Court for the determination of a dispute in relation to property. There was a similar provision in the repealed Act. This provision, by enabling the parties to proceed by application, enables a more rapid resolution of the question in issue than would occur under the usual procedures for resolution of civil claims. However, the operation of this provision is limited as most property disputes between husband and wife are within the exclusive jurisdiction of the Family Court of Australia.

Section 14 provides that the Magistrates Court only has jurisdiction to resolve disputes of the kind referred to in section 13 where the title to land is not in question and where the value of the property involved does not exceed \$10,000.

Section 15 sets out the powers of the court where an application is brought under section 13. They include powers to grant an injunction until the application is determined, to make orders in relation to title to the property and possession or disposition of the property, including the sale, partition or division of the property, to set aside any transfer or sale

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of property made to defeat an order or apprehended order in respect of the property, to require one spouse to pay money to the other spouse, and to direct an inquiry into the matters in question.

When making an order the court must have regard to and protect the interests of a third party who bought the property in dispute in good faith.

Section 16 repeals the Married Women's Property Ordinance 1968. That Ordinance amended the Married Women's Property Act 1901 (N.S.W.) as it applied in the A.C.T.

Section 17 provides that the Married Women's Property Act 1901 (N.S.W.) ceases to be in force in the Australian Capital Territory.

Section 18 amends the Second Schedule to the Seat of Government (Administration) Ordinance 1930 so that the Ordinance is administered by the Attorney-General.

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